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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 937

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND NORTH SHORE COMMUTERS ASSOCIATION,

(Plaintiffs) Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY,

(Defendants) Appellees.

PETITION FOR REHEARING.

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INDEX.

	PAGE
Petition for Rehearing	1-15
Preliminary Statement	2-5
The Decision in United States v. Chicago N. S. & M. RR ("The Prior North Shore Case") 288 U. S. 1, and the Grounds on Which It Was Distinguished in the Instant Case	3-5
Points Relied Upon as Requiring Reconsideration by the Court of Its Decision in This Case	6-15
The Decision in the Prior North Shore Case (288 U. S. 1) is Controlling in the Instant Case on the Question of Jurisdiction	8-14
1. There Has Been No Change in the Character of the North Shore's Railroad Since the Decision in the Prior North Shore Case	8-9
2. The Decision in the Prior North Shore Case is a Definite Adjudication That the North Shore's Railroad is an Electric Interurban Railroad of the Type Specifically Excepted From the Jurisdiction of the Interstate Commerce Commission by the Exclusion Clause in Section 20a—Which is the Same as the Corresponding Clause in Paragraph (22) of Section 1 of the Interstate Commerce Act	9-12
3. The Exclusion Clause in Paragraph (1) of Section 1 and the Corresponding Clause in Section 20a Are in the Same Words and for the Same Purpose. The Two Clauses Must, Therefore, be Given the Same Construction	12-14
The Alleged Operating Losses	14
Certificate of Counsel	16

Table of Cases Cited.

Commissioner of Int. Rev. v. Ridgeway's Estate, 291 Fed. 2d (CA 3), 257 13

Re Chicago, N. S. & M. Ry. (Shore Line Abandonment Case), 290 ICC 765 12

Piedmont & Northern Ry. Co. v. Interstate Com. Com., 286 U. S. 299 11

State of Illinois v. United States, 213 Fed. Supp. 83 .. 2, 3

Schooler v. United States, 231 Fed. 2d (CA 8), 560 (563) 13

United States v. Chicago, M. & N. S. R. R., 288 U. S. 1 ..... 3 and Throughout the Petition

Statutes Cited.

Interstate Commerce Act—Title 49 U. S. C.:

Paragraph (22) of Section 1 2

Section 20a 3

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY,

(Defendants) Appellees.

PETITION FOR REHEARING.

Appellants, the State of Illinois, Illinois Commerce Commission, and North Shore Commuters Association (plaintiffs below) petition the Court to grant a rehearing and to reconsider its decision in this case.

In support of this petition, Appellants suggest that the Court overlooked, or misapprehended, certain controlling points set forth below.

PRELIMINARY STATEMENT.

This is an appeal from the judgment of a three-judge District Court (reported in *State of Illinois* v. *United States*, 213 Fed. Supp. 83) dismissing a complaint seeking to set aside and to enjoin enforcement of an order of the Interstate Commerce Commission authorizing Appellee, Chicago, North Shore & Milwaukee Railway Co. (herein called "the North Shore") to abandon its entire electric railroad.

The primary question in the case is whether the Interstate Commerce Commission had jurisdiction under Paragraphs (18) and (20) of Section 1 of the Interstate Commerce Act (Title 49 USC) to authorize the abandonment.

Paragraph (22) of Section 1 of the Act provides that the jurisdiction of the Commission to authorize abandonment "shall not extend to * * * street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation."

If then, the North Shore's railroad is an electric interurban railroad of the type specified in Paragraph (22), it is excluded by Act of Congress from the jurisdiction of the Interstate Commerce Commission, and the decision on the question as to whether abandonment should be authorized is left to the state commissions.

THE DECISION IN THE PRIOR NORTH SHORE CASE (288 U. S. 1) HOLDING THE NORTH SHORE TO BE A TYPICAL INTERURBAN ELECTRIC RAILROAD AND THE GROUNDS UPON WHICH THAT CASE WAS DISTINGUISHED HERE.

Section 20a of the Interstate Commerce Act, providing for approval of security issues by the Interstate Commerce Commission, contains a clause, identical with that in Paragraph (22) of Section 1 of that Act (except for substitution of the singular for the plural number) excepting from jurisdiction of the Commission under Section 20a "a street, suburban, or interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation."

In construing that clause in Section 20a, this Court held, in *United States* v. *Chicago, N. S. & M. R. R.*, 288 U. S. 1, decided in 1933 (referred to herein as "the prior North Shore case"), that the North Shore's railroad is "an interurban electric railway" of the type specified and therefore is excepted from the jurisdiction of the Interstate Commerce Commission under Section 20a of the Interstate Commerce Act.

The decision of the three-judge District Court in the instant case (from which this appeal was taken) distinguished the decision in the prior North Shore case, and held it not applicable to the instant case, on the following grounds (213 Fed. Supp. at pp. 86-88):

> "The Supreme Court in *United States* v. *Chicago North Shore and Milwaukee Railroad*, 288 U. S. 1 (1933), held that the North Shore fell within the exemption of Section 20a of the Interstate Commerce Act. Section 20a contains wording which is identical to that of Section 1 (22). In examining the activities of the North Shore, the Court concluded:
>
> 'We thus have a typical example of an interurban electric line for passenger service, which

has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier. The facts differentiate the case from *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*, * * * There the railroad was predominantly a carrier of interchange carload freight. * * * The purely local traffic in freight, passengers, baggage and express was there relatively inconsequential; but here greatly preponderates.'

The Supreme Court was asked to conclude that the North Shore railroad had issued securities over a period of ten years in violation of Section 20, wherein such conclusions might have rendered these securities of no value. Throughout the period in which they were issued the Commission had never challenged the right or authority of the North Shore to issue these securities. That the Court's decision was influenced by an estoppel rationale based on the Railroad's reliance on past administrative rulings is evident:

'With this knowledge of the situation the Commission never, until it requested the attorney general to institute the present suit, by word or act intimated that the procedure followed by the railroad was illegal or the state regulatory bodies without jurisdiction. It would be difficult indeed to conceive a clearer case of uniform administration construction of § 20a as applied to this company. *Conceding that the proper classification of the railway is not free from difficulty*, all doubt is removed by the application of the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons. * * * The primary responsibility rested upon the Commission to determine whether under the circumstances the railway was required to procure leave under § 20a. for the issuance of securities. Evidently entertaining serious doubts on this question it has for more than a decade resolved them in favor of the car-

> rier, and the company and its officers have acted in reliance on the administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation.' (Emphasis supplied.)
>
> . . . . .
>
> It is apparent from the decisions following the Supreme Court *North Shore* case that exemptions similar to Section 1(22), but which are found in other provisions of the Interstate Commerce Act, or in other Acts, allow different interpretations, depending on the purpose of the Act, the underlying issues, and the particular facts of the case."

This Court, in affirming, without opinion, the decision of the district court, presumably adopted the grounds stated in the opinion of that court, as above quoted, in support of the holding that this Court's decision in the prior *North Shore* case is not applicable to, and should not be followed in, the instant case.

POINTS RELIED UPON AS REQUIRING RECONSIDERATION BY THE COURT OF ITS DECISION IN THIS CASE.

We submit that in holding the decision in the prior *North Shore* case to be not applicable and in affirming the judgment of the District Court sustaining the jurisdiction of the Interstate Commerce Commission, this Court failed to give due weight to the following points.

1. The record shows that there has been no change in the character of the North Shore's railroad since the decision in the prior *North Shore* case in 1933, and if the clause excluding the Interstate Commerce Commission from jurisdiction over electric interurban roads was applicable to the North Shore's railroad then, it is equally applicable now.

2. In the prior *North Shore* case, the Court decided definitely that the North Shore's railroad must be classed as an interurban electric railway which is not part of a general steam railroad system of transportation, and that it is therefore specifically excluded from jurisdiction of the Interstate Commerce Commission under Section 20a. As grounds for that decision, the Court held:

(a) That the North Shore's railroad "*is a typical example of an interurban line for passenger service*" with such incidental freight traffic as could be developed "without interference with the main purpose of the carrier" (288 U. S. pp. 7-10); and hence that as "a matter of first impression * * * though the decision is not free from difficulty," the Court "would be inclined to hold Section 20a as inapplicable"—*i.e.*, that the North Shore's railroad is an electric interurban railroad excepted by the exclusion clause in question from the jurisdiction of the Interstate Commerce Commission (288 U. S., at pp. 10-11); and

(b) That all doubts as to the correctness of the conclusion that the North Shore's railroad is an interurban electric railroad of the type excluded from jurisdiction of the Commission are removed by consideration of the past administrative construction as to the character of the North Shore's railroad (288 U. S., at pp. 12-13).

On both grounds above stated, the adjudication was final that the North Shore's railroad is correctly classified as an electric interurban railroad excluded by statute (Section 20a in that case) from jurisdiction of the Interstate Commerce Commission.

3. It has thus been adjudicated that the jurisdiction exclusion clause in Section 20a applies to the North Shore's railroad and that the railroad is a "typical example of an interurban electric line" excepted by the exclusion clause from jurisdiction of the Interstate Commerce Commission.

The same construction must be given to the jurisdictional exclusion clause in Paragraph (22) of Section 1. The two clauses are in the same statute; are in the same words; and have the same purpose—*i. e.*, to exclude the Interstate Commerce Commission from jurisdiction over this type of electric railroad. They must be given the same meaning and application.

We submit the following suggestions in support of the foregoing propositions.

THE DECISION IN THE PRIOR NORTH SHORE CASE (288 U. S. 1) IS CONTROLLING IN THE INSTANT CASE ON THE QUESTION OF JURISDICTION.

1.

There Has Been No Change in the Character of the North Shore's Railroad Since the Decision in the Prior North Shore Case.

The principal ground upon which Appellees sought to distinguish this Court's decision in the prior *North Shore* case was that there is an interchange of freight by the North Shore's railroad with various connecting interstate carriers.

But the same condition existed when the prior *North Shore* case was decided in 1933. In fact, at that time the North Shore had 114 freight cars of its own and 22% of its revenue was derived from freight (288 U. S., at p. 9). During the period involved in the instant case, the North Shore owned no freight cars and its freight revenue had dropped to 14% of the total revenue. No freight is handled at either the Chicago or Milwaukee terminals and the passenger cars are all of the type that can operate on the elevated tracks in Chicago and over streetcar tracks in Milwaukee.

The interchange of freight with other railroads, at connecting points outside the city limits, was then in effect as it is now. But, as the Court stated (288 U. S. at pp. 9-10), such freight handling was [as it is now] incidental in character, compared with the primary purpose of North Shore—*i.e.*, to operate a "typical * * * interurban electric

line for passenger service," with freight service as a minor side line.

It cannot now be held that this incidental freight business destroys the character of the railroad as "an interurban electric railway" without wholly disregarding the decision of this Court in the prior *North Shore* case.

The decision in the prior *North Shore* case is as applicable to the North Shore's railroad today as it was when rendered in 1933.

2.

THE DECISION IN THE PRIOR NORTH SHORE CASE IS A DEFINITE ADJUDICATION THAT THE NORTH SHORE'S RAILROAD IS AN ELECTRIC INTERURBAN RAILROAD OF THE TYPE SPECIFICALLY EXCEPTED FROM THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION BY THE EXCLUSION CLAUSE IN SECTION 20a—WHICH IS THE SAME AS THE CORRESPONDING CLAUSE IN PARAGRAPH (22) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT.

The judgment of the District Court and the affirming order of this Court, holding that the decision in the prior *North Shore* case is not controlling here, rests mainly on the assumption that that decision was based on administrative construction in the nature of an estoppel, and that the decision would have been different if the case had rested wholly on an initial determination as to the character of the North Shore railroad.

Even if (contrary, as we believe, to the fact) that assumption were correct, the adjudication still was that the North Shore's railroad is, in fact, and was recognized in practice to be, an interurban electric railroad of a type excepted from the jurisdiction of the Interstate Commerce Commission under Section 20a. And, as shown in the

next subdivision below, if the exception applies under Section 20a, it must also apply under the clause of the same wording in Paragraph (22) of Section 1.

Whatever the ground for the adjudication, it must be given effect. It characterizes the railroad and that characterization is controlling in construing a like exclusion clause in any other section of the Interstate Commerce Act.

But there is no ground for assuming that the decision of the Court in the prior *North Shore* case rested wholly on administrative construction in the nature of an estoppel. An estoppel, or administrative construction, would not confer jurisdiction on the Interstate Commerce Commission where it was not conferred by statute. The administrative construction merely indicated a recognition by the administrative officials of the fact that the North Shore's railroad is "an electric interurban railroad" of a character excepted from jurisdiction of the Commission and confirmed the opinion of the Court that (irrespective of administrative construction) the North Shore's railroad was of that type.

An examination of the opinion in the prior *North Shore* case shows that the greater part of it (288 U. S. pp. 6-11) is given to showing—without mention of administrative construction—that the North Shore's railroad is an electric interurban railroad of the type described in the exclusion clause in Section 20a (the same in wording as that in Paragraph (22) of Section 1).

As was said by this Court, after a thorough review and analysis of the facts showing the character of the railroad (288 U. S. p. 10):

> "The railroad was constructed to afford a fast electric passenger service between Chicago and Milwaukee and suburban passenger service into and out of Chicago. The freight business is subsidiary to this primary function, and is not fairly comparable to that

ordinarily transacted by a standard steam railroad. Passenger traffic, whether measured by car service or by gross earnings, heavily preponderates over interline freight business. The main terminals serve only the passenger and merchandise freight traffic.

We thus have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier."

The Court then, after distinguishing *Piedmont & Northern Ry. Co.* v. *Interstate Com. Com.*, 286 U. S. 299 on the ground that the Piedmont Railway was predominantly a freight carrier, continued, as follows (288 U. S., pp. 10-11):

"If the status of the appellee were a matter of first impression, we should, though the decision is not free from difficulty, be inclined to hold Section 20a inapplicable."

After arriving at the foregoing conclusion, the Court then, for the first time, comments on the fact that the Interstate Commerce Commission had recognized the characterization of the North Shore's railroad as "an electric interurban railway" excepted by the exclusion clause from jurisdiction of the Commission, and in the issue by the North Shore of securities approved only by the State Commission.

The Court held this administrative construction to be clearly in accord with the Court's interpretation of the exclusion clause and confirmed the conclusion that the North Shore's railroad was of a type excluded from the jurisdiction of the Commission.

The decision that the North Shore's railroad is "a typical example of an interurban line for passenger service" and that it is therefore excepted by the exclusion clause in Section 20a (and here also by the same clause

in Paragraph (22) of Section 1) is thus based on an analysis of the character of the railroad as supported by the acquiescence of the enforcing authorities over an extended period.

And that decision was adhered to and followed in litigation before the State Commissions on all transportation matters (including abandonment suits as well as security issues and "spin-offs") through 1953 and until the Shore Line Abandonment case was filed in 1954.

The Shore Line Abandonment case (290 ICC 765) was decided by a division of three commissioners, one of whom dissented on the ground that under the prior *North Shore* case the Interstate Commerce Commission had no jurisdiction. The case was not carried further as the State Commission acquiesced in the abandonment.

We submit that the decision in the prior *North Shore* case (288 U. S. 1) is controlling and definitely adjudicates that the North Shore's railroad is "an interurban electric railway which is not part of a steam railroad system of transportation" and is therefore excepted from the jurisdiction of the Interstate Commerce Commission by the exclusion clause there in question.

3.

THE EXCLUSION CLAUSE IN PARAGRAPH (1) OF SECTION 1 AND THE CORRESPONDING CLAUSE IN SECTION 20a ARE IN THE SAME WORDS AND FOR THE SAME PURPOSE. THE TWO CLAUSES MUST, THEREFORE, BE GIVEN THE SAME CONSTRUCTION.

The language of the exclusion clause in Paragraph (1) of Section 1 of the Interstate Commerce Act is the same as that in Section 20a held by this Court in the prior *North Shore* case not to apply to the North Shore's railroad.

The purpose of each of the two clauses is also the same (*i.e.*, to exclude from the jurisdiction of the Interstate Commerce Commission electric interurban railroads of the type specified.

Where the same words or phrases are used with a similar purpose in different parts of the same statute, they will be presumed to have the same meaning and application.

Schooler v. *United States*, 231 Fed. 2d (CA 8), 560 (563).

Com. of Int. Rev. v. *Ridgeway's Estate*, 291 Fed. 2d (CA 3), 257 (259).

As was said in the last-cited case (291 Fed. 2d at p. 259):

> "Where a word or phrase is used in different parts of the same statute it will be presumed to have the same meaning throughout * * * [citing cases] * * *. The need for uniformity becomes more imperative where the same word or term is used in different sections that are similar in import and content."

And the similarity in language and purpose was recognized by this Court in the prior *North Shore* case, where this Court, in distinguishing, on other grounds, the construction of Paragraph (22) of Section 1 involved in the *Piedmont Railroad* case (286 U. S. 299), noted that the exclusion clause in Paragraph (22) of Section 1 is "*couched in the same language,*" and therefore, subject to the same construction, as the exclusion clause in Section 20a at issue in the prior *North Shore* case (see 288 U. S. at p. 10).

If the North Shore's railroad is excepted by the exclusion clause in Section 20a from the jurisdiction of the Commission under that Section because, as this Court said (288 U. S., at p. 10), it is "a typical example of an interurban line for passenger service," the railroad must be excepted for the same reason from the jurisdiction of the

Commission under the like exclusion clause in Paragraph (22) of Section 1.

The North Shore's railroad cannot be treated as an interurban electric railway not subject to the Commission's jurisdiction, for one purpose, and treated as a different kind of railroad, subject to the Commission's jurisdiction, for another purpose, depending upon which characterization may seem preferable to the North Shore or to the Commission.

THE ALLEGED OPERATING LOSSES.

The only question before this Court is as to the jurisdiction of the Interstate Commerce Commission.

The presence or absence of operating losses has no bearing on that question.

Furthermore, pending the decision in this case, there can be no "operating losses" of consequence. The North Shore suspended operation of its railroad shortly after judgment of the District Court, here appealed from; and although the equipment remains in place, no operations are being carried on.

We submit:

1. That this petition for rehearing should be granted.

2. That the decision of this Court should be reconsidered and the motions of appellees to affirm the judgment of the District Court should be denied.

3. That the questions presented by this appeal are substantial and of such serious import as to require plenary consideration with briefs on the merits and oral argument for their determination; and

4. That probable jurisdiction should be noted.

Respectfully submitted,

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certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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